No. 17074

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK BRENHA, JR., *et al.*,

Appellants,

vs.

ALFRED J. SVARDA,

Appellee.

APPELLEE'S REPLY BRIEF.

MELVIN M. BELLI,
722 Montgomery Street,
San Francisco 11, California,

WILLIAM F. REED,
630 San Diego Trust & Savings Bldg.,
San Diego 1, California,

Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

I.

Appellee's statement of the case 1

II.

Argument 3

A. The evidence 5

B. There are no errors in Finding of Fact No. 8 8

III.

Memorandum of law 10

A. Findings of fact should not be set aside unless clearly erroneous 10

B. Only slight proof of proximate cause necessary 11

IV.

Conclusion 15

TABLE OF AUTHORITIES CITED

Cases

	PAGE
Cleo Syrup Corp. v. Coca-Cola Co., 139 F. 2d 416, cert. den. 321 U. S. 781, 64 S. Ct. 638, 88 L. Ed. 1074	10
Ferguson v. Moore-McCormick Lines, 352 U. S. 521	13
Johnson v. Griffiths, 150 F. 2d 224	12
Johnson v. United States, 333 U. S. 46	11
Mason v. Lynch Bros., 228 F. 2d 709	13
Menafee v. W. R. Chamberlain Co., 176 F. 2d 828	11
Nee v. Lynwood Securities Co., 174 F. 2d 434	10
Rogers v. Missouri Pacific Ry. Co., 352 U. S. 400	14
Shapiro v. Rubens, 166 F. 2d 659	10
United States v. Aluminum Co. of America, 148 F. 2d 416	10

Rules

Federal Rules of Civil Procedure, Rule 52(a)	10

Textbooks

Gilmore and Black, The Law of Admiralty	11
Restatement of Law of Torts (1948 Supp.), Sec. 435	14

No. 17074

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK BRENHA, JR., *et al.*,

Appellants,

vs.

ALFRED J. SVARDA,

Appellee.

APPELLEE'S REPLY BRIEF.

I.

Appellee's Statement of the Case.

Appellants concede that the fishing vessel was unseaworthy and the shipowners were negligent in furnishing the plaintiff an unsafe place to work. The unseaworthiness and negligence consisted of allowing the eyebolt supporting the fishing rack on which the plaintiff was fishing to become so corroded that it failed, with the result that the rack suddenly dropped downward as the plaintiff was landing a fish. The appellants contend, however, that the sudden dropping of the fishing rack, which caused the plaintiff to lose his balance and partially fall down while in the act of landing a fish, was not the proximate cause of the fishhook entering the plaintiff's eye.

The appellants entire point on appeal is that the fish had already been landed on the deck in the normal manner and that the plaintiff was trying to jerk the hood out of the fish's mouth, and it was this act of the plaintiff, and not the sudden collapse of the rack, and the plaintiff's resultant fall which was the proximate cause of his injuries.

The appellants completely disregard the substance of the testimony of all of the witnesses to the effect that the plaintiff was in the act of landing a fish when the rack broke and that he was thrown off balance and partially fell down preventing him from completing the normal procedure in landing the fish. In the normal procedure a fisherman has the pole in a leather pad attached to his belt. When a fish bites, a pulling pressure is applied by the fisherman leaning back against the funnel. As the fish goes over his head, the pole is removed from the pad, the fisherman turns, and the pole is moved in the direction towards which the fish is going through the air so that there is no tension on the line as the fish lands on the deck. [T. R. 281.] The plaintiff was injured when the fish was being landed and the pole was still in his pad. The plaintiff fell over when the rack dropped, his fall putting pressure on the line at a time when it normally would be slack. This tension on the line as a result of the plaintiff's fall pulled the hook from the mouth of the fish into plaintiff's eye.

II.
Argument.

Appellants argue that the plaintiff landed the fish in the normal manner, taking his pole out of the pad as the fish landed on the deck, and that the proximate cause of the accident was the act of the plaintiff in intentionally jerking the line to remove the hook from the fish after it had been landed on the deck. This contention is purely a figment of appellants' imagination.

The evidence in this case is all to the effect that while the fish was being landed and the plaintiff's pole was in his pad, the rack gave way, putting tension on the line at a time when under normal circumstances plaintiff would have removed the pole from the pad and followed the fish toward the boat, releasing all tension. [T. R. p. 188, pp. 274, 278.] The rack gave way and the plaintiff was injured in a matter of seconds. Appellants are endeavoring, by the use of semantics unsupported by the evidence, to avoid their responsibility of furnishing this plaintiff a safe place to work. If a winch driver fell into the winch gear as a result of losing his balance when the working platform gave way, these appellants would argue that there was no causal connection between the failure of the platform and his injury. A fishhook like winch machinery, is dangerous; but if the fisherman, like the winch driver, is furnished a proper and stable place to work, there is little or no danger of injury. To contend that the failure of the working platform, which in either instance can bring the workman in contact with the dangerous

instrumentality—the fishhook or the gear, is factually untenable.

The able Trial Court, commencing on page 386 of the Transcript, in the following language found that the evidence shows the rack failure as the sole and proximate cause of plaintiff's injuries:

> "The Court finds that as this thing happened all of a sudden in a moment or second or so the giving away of the rack caused the situation where increased tension was put on the line, the hook jerked out of the mouth of the fish, plaintiff's face was turned toward the rear, and the hook caught him in the right eye. I don't think that those findings are inconsistent with what the witnesses have said here.
>
> A man engaged in a hazardous occupation knows what he is about, but more the reason that he should be given a safe place to work and not have the hazard of an insecure footing added to the hazards of his occupation.
>
> Within this five-second interval it is not possible for the Court to say exactly when that rack gave way. But obviously there was insecure footing from the time the rack gave way. Nor do we know whether this rack gave way suddenly or whether it took a second or two for the bolt to pull out of the stern of the ship and allow the rack to settle. At any rate, here is a man, with a fish that he landed, on an insecure footing. It could well have been that as he attempted to pull the fish forward the ordinary shifting of weight in attempting to take another motion brought about the situation where he no longer had the secure

footing to stand upon and the tension was put upon the line. This matter of hooking a fish, swinging it back and all is almost like a golf stroke—there is a rhythm of motion, and it requires a safe place for a man to stand who engages in this activity."

A. The Evidence.

The plaintiff testified that the pole was still in the pad at the time of his injury. [T. R. pp. 188, 208.] Edward S. Varley, the defendants' expert, testified that proper fishing technique requires that the pole be removed from the pad before the fish hits the deck so as to avoid having tension on the line. [T. R. p. 274.]

The failure of the rack, the plaintiff's fall and the injury all happened instantaneously while the fish was being landed. Appellants' contention that the fish has been landed in the normal manner and that the plaintiff was injured after completing the normal procedure when he was attempting to remove the hook from the fish's mouth has no support in the evidence.

The plaintiff testified [T. R. p. 192]:

"A. —and as I came back with the fish, it all happened so fast that as I come back, naturally I'm leaning back, and then I just felt like I fell, which I did.

Q. What caused you to fall? A. The rack give down underneath me, and at the same time I'm worrying about the fish and I got it in, naturally I'm going to pull it toward you or jerk it toward you, one or the other, so you can—

Q. With a forward motion. A. Yes, sir—so you can turn around and unhook. Well, at the time it all happened so fast I didn't even know—

the hook flew from its mouth and the next thing I know it's in my eye.

Q. When you say the hook flew from its mouth, when was that event with reference to the time that the staging gave way? A. It all happened together, sir."

[T. R. p. 226]:

"The Witness: Now you've got the fish out of the water, you're coming back, you're leaning back. As you come on back and bring it back, I was like this here, all of a sudden I felt myself go down. I was definitely leaning back. Naturally—

Mr. Lande: All right, now—

The Court: Just don't interrupt.

The Witness: Then there was that jerk on my line, and I'm leaning back like this here, and all of a sudden the next thing I know it's in my eye, and the only thing I know is I hollored out 'Oh God, my eye.'"

In his testimony the plaintiff specifically denied that appellant's contention that jerking the hook from the fish's mouth was the cause of his injury.

[T. R. p. 218, in response to questioning by the Court]:

"The Court: Well, I've been trying to see one of two things now. I've thrown the fish over my shoulder and it has hit the deck. Now I could do many things, but let's take two. I could then pull on the pole to make the fish slide up to the rail so I could disengage it, which would be a pull calculated to slide that fish up where I can grab it.

The Witness: Yes, sir.

The Court: Or my fish has hit the deck and is laying there with a bunch of other fish and I could give the pole a real stiff jerk with the idea in mind of breaking the hook out of its mouth. That's possible.

The Witness: That's possible.

The Court: Is that done?

The Witness: No, sir, normally a man unhooks a fish like that there, if he don't want to unhook it himself he takes his pole and puts it over on top of the bait tank and he jerks up like that and he's got the fish dangling there and then it will break loose and it won't fly like it would any other way."

[T. R. p. 227]:

"Q. No, I asked you whether or not it's true that you jerked the pole of your own intention to get the hook out of the fish's mouth. A. No, sir."

Both the plaintiff and the defendants' expert, Mr. Varley, demonstrated in the courtroom the proper technique of landing fish, which consisted of taking the pole out of the pad and turning around, releasing the tension on the line as the fish lands. [T. R. pp. 274 *et seq.*] Mr. Varley testified that if this proper technique is used, it is impossible for a fisherman to get his own hook in his eye. This testimony, on page 287 of the Reporter's Transcript is as follows:

"Q. If it is done properly by a good fisherman, when the fish is down on the deck, ordinarily and in the usual course of events, the hook does not fly out of that fish's mouth, does it? A. No.

Q. And ordinarily and in the usual course of events when the fish hits the deck the fisherman doesn't pull that hook out of that fish's mouth so that it will come at him, does he? A. No.

Q. As a matter of fact, in the usual course of events and in the normal operation of a one-pole fish of—20 to 30 pounds, I guess, that would be the outside?

The Court: For one pole?

Mr. Belli: Twenty pounds to one pole.

Q. Is that a one-pole fish A. Yes, 20 to 25 pounds.

Q. You have never heard of a man, when the fish gets down on the deck, hooking himself in an eye with his own hook, have you? A. No, I never have."

The sudden falling of the rack threw the plaintiff off balance and (*instead of the pole coming out of the pad it remained therein* and) the fall put tension on the line causing the hook to snap out of the fish's mouth into the plaintiff's eye. Thus, instead of the line being slack when the fish would be landing, tension was put on the line, causing the hook to come towards the plaintiff.

The proximate cause of the injury was the malfunctioning of the fishing rack which precluded the plaintiff from completing the landing of the fish in a normal manner.

B. There Are No Errors in Findings of Fact 8.

The appellants cite a part of a single sentence from this detailed finding as to the manner in which plaintiff was injured. They contend that the finding "that

the fish had been landed on the deck when unusual tension occurred on the fishline" is not supported by the evidence.

In this same finding the Court found that the events from the hooking of the fish until the fishhook entered the plaintiff's eye occupied at most only two or three seconds. The above quoted testimony of the plaintiff is to the effect that the dropping of the rack, the fall and the hook entering his eye all occurred practically instantaneously. Mr. Varley, the defendants' expert, demonstrated in detail the correct procedure of hooking and landing fish [T. R. p. 274, *et seq.*] and stated that if the correct procedure was used, the fishhook would not have come near the plaintiff's head or eye, that when a fisherman is using the proper procedure in the landing and catching of a fish and he is fishing from a stable rack, his own fishhook will not come in the vicinity of his own eye, and that he has never heard of a fisherman getting his own hook in his eye. [R. T. p. 287.] Mr. Varley also testified that as the fish passes over the fisherman's body, the fisherman ceases the tension on the line. [T. R. p. 286.] The plaintiff testified that as he brought the fish in the rack gave way [T. R. p. 194], and the appellant's expert, Mr. Varley, testified that there is only one place for the fish to go after it is brought over the fisherman's shoulder and that is on the boat. [T. R. p. 280.] The ship's captain, A. N. Holbrook, also testified that the fish landed on the deck. [T. R. p. 248.]

The above Finding is amply supported by the evidence.

III.
Memorandum of Law.

A. Findings of Fact Should Not Be Set Aside Unless Clearly Erroneous.

Rule 52(a) of the Federal Rules of Civil Procedure sets forth the well-established rule that findings of fact shall not be set aside unless clearly erroneous. This rule is stated in the case of *Cleo Syrup Corp. v. Coca-Cola Co.* (C. C. A. 8th, 1943), 139 F. 2d 416, cert. den. (1944) 321 U. S. 781, 64 S. Ct. 638, 88 L. Ed. 1074, as follows:

> "This Court, upon review, will not retry issues of fact or substitute its judgment with respect to such issues for that of the trial court. (Citing cases.) The power of a trial court to decide doubtful issues of fact is not limited to deciding them correctly. (Citing cases.) In a non-jury case, this Court may not set aside a finding of fact of a trial court unless there is no substantial evidence to sustain it, unless it is against the clear weight of the evidence, or unless it was induced by an erroneous view of the law. (Citing cases.)" (139 F. 2d at 417-418.)

See also the following:

Nee v. Lynwood Securities Co. (C. A. 8th, 1949), 174 F. 2d 434, 437;

Shapiro v. Rubens (C. C. A. 7th, 1948), 166 F. 2d 659, 665, 666;

United States v. Aluminum Co. of America (C. C. A. 2d, 1945), 148 F. 2d 416, 433.

B. Only Slight Proof of Proximate Cause Necessary.

In maritime law only slight proof of proximate cause is necessary. *The Law of Admiralty*, Gilmore and Back, in discussing "proximate cause", uses the following language, commencing on page 311:

> "The Jones Act plaintiff bears the burden of going forward with evidence on the essential elements of a negligence action: the existence of a duty; the negligent violation of the duty by defendant; and the causal relationship of violation to injury. On the first two issues his burden is lightened by the doctrine of the shipowner's 'higher duty' announced in the Cortes case. On the proximate cause issue his burden is likewise reduced to featherweight by the Supreme Court's development of its own special brand of res ipsa loquitur, which it has described as a rule of 'permissible inferences from unexplained events.' "

and on page 312:

> "It does not seem to be overstating the Johnson case much, if at all, to conclude that plaintiff makes his prima facie case by showing that he was injured and that the injury could have been caused by the negligence of the shipowner (in furnishing defective equipment) or of a fellow crew-member. In a case tried to the court (like Johnson) that is enough to justify the trial judge in giving plaintiff a verdict;" (See *Johnson v. United States,* 333 U. S. 46.)

In the case of *Menafee v. W. R. Chamberlain Co.,* 176 F. 2d 828, it was held that stowing a manila hawser on the vessel's fan tail was the proximate cause

of injuries sustained by a seaman who was injured attempting to clear the hawser from the ship's propeller after it was washed overboard by a storm.

In the case of *Johnson v. Griffiths,* 150 F. 2d 224, the plaintiff seaman was sent forward to investigate a grinding noise being made by the anchor chain. He fell into an open hold and was killed. In the trial court there was evidence of several negligent conditions but the suit was dismissed on the ground that none of them was the proximate cause of the injuries. In reversing the trial court and holding that the proximate cause had been established, the Ninth Circuit Court of Appeals said:

> "It is the duty of a vessel to provide a safe working place for members of its crew. What does it matter which one or how many of the negligent conditions caused the injury? There is evidence that the vessel was anchored in an open roadstead, under blackout conditions with no lights on deck; the weather was freezing and ice and sleet were on the deck; the vessel was pitching heavily; the passageway in the forepeak was obstructed with dunnage and debris; the guard on the steampipe over which the men were required to walk was loose and shaky causing limited visibility from the leaking steam. Under these circumstances the maintenance of an open hatch with no life-line about it constitutes negligence which is so closely related to the injury in this case as to impel the conclusion that it was the proximate cause of the death."

In the case of *Mason v. Lynch Bros.*, 228 F. 2d 709, it was held that the failure of the owners to have a tankerman as a member of the crew was the proximate cause of injuries sustained by a seaman who connected an oil line to a barge, allowed some of the oil to spill onto the deck, and received injuries as a result of slipping and falling on the oiled deck.

In the case of *Ferguson v. Moore-McCormick Lines,* 352 U. S. 521, the plaintiff pantryman had been ordered to serve ice cream to members of the crew. Fellow workmen had forgotten to take the ice cream out of the freezer to allow sufficient time for the ice cream to become soft and pliable, with the result that the scoop he had been furnished would not cut into the frozen ice cream. He attempted to serve the ice cream by using a knife, resulting in an injury to his hand and the loss of two fingers. He was awarded $17,500.00 in the trial court. The Circuit Court reversed the judgment, saying there was no causation or proof of negligence. The United States Supreme Court reversed the Circuit Court, using the following language at page 523:

> "It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident. The jury was instructed that it might consider whether respondent could have anticipated that a knife would be used to get out the ice cream. On this record fair-minded men could conclude that respondent should

have foreseen that petitioner might be tempted to use a knife to perform his task with dispatch, since no adequate implement was furnished him . . . :

> " 'Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.' " (Quoting from *Rogers v. Missouri Pacific Ry. Co.*, 352 U. S. 400.)

The rule of the *Ferguson* case to the effect that it is not necessary that a tortfeasor shall have foreseen the extent of the injury or the manner in which it might occur before liability can be predicated is set forth in *Restatement on Torts,* 1948 Supp., Sec. 435., and was adopted by the Trial Court in its Conclusions of Law. [T. R. p. 20.]

Appellee has more than complied with the rule which requires only slight proof of proximate cause in that the evidence clearly establishes that the failure of the rack was the effective cause of the chain of circumstances which ultimately brought the fishhook in contact with appellee's eye. As the Trial Court so ably stated, the fishing procedure is a rhythmic movement of several phases, the completion of which in this case was prevented by the rack failure.

IV.
Conclusion.

If the plaintiff had been furnished a stable platform from which to fish, he would have landed his fish without incident. The sole and proximate cause of his injury was the unseaworthiness of the vessel and the negligence of the appellants in providing plaintiff a defective fishing rack from which to fish. The judgment should be sustained.

Respectfully submitted,

MELVIN BELLI,
WILLIAM F. REED,
Attorneys for Appellee.